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After all, the matter in the instant case is one of statutory construction. Certainly the federal statute under consideration[10] does not make it plain that the economic interest in the property of national banks should be taxed only once. And it is to be questioned whether it is wise to read such provision into the statute in view of the fact that double taxation of this character has always been permitted in the case of other corporations.

GENERAL TESTAMENTARY POWERS UNDER THE RULE AGAINST PERPETUITIES.—It is generally recognized that an estate created by virtue of a power of appointment takes effect as if conveyed by the original instrument creating the power.[1] It follows, therefore, that the period within which such estate must vest under the Rule against Perpetuities is to be computed from the time when the instrument creating the power becomes effective, namely, from the time of delivery in case of a deed, and from the time of the death of the testator, in case of a will.[2] This is the rule when the power is a special one;[3] that is, when the power is restricted in scope, either as to those to whom an appointment may be made, or as to the quantum of the estate to be appointed.[4] In case of a general power of appointment, however, an exception is made. Where the power is such that the donee may by deed or will appoint any estate he chooses up to a fee simple, to whomsoever he chooses,[5] the *terminus a quo* for the application of the Rule against Perpetuities is considered to be the time of the exercise of the power.[6] So far there is little conflict in the authorities.

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[10] *Supra,* footnote 5.

[1] Roach v. Wadham (1805) 6 East 289; Doe d. Wigan v. Jones (1830) 10 B. & C. 459. Various explanations for this rule have been attempted. Mr. Gray, Rule against Perpetuities (3rd ed.) § 514 gives as a reason that otherwise an indefinite series of life estates might be created. Mr. Lewis, Perpetuities, *485, gives the reason that otherwise one could do indirectly what the law prevents his doing directly. Mr. Foulke in an article "Powers and Perpetuities", 16 Columbia Law Rev., at p. 634, suggests that the appointment is read back because in case of a special power of appointment, the tenant of the particular estate is enabled to do something not incident to that estate, his capacity depending on the power, not on his title. Consequently, the act of the donee of the power is considered very properly the act of the donor of the power.

[2] Routledge *v.* Dorril (1794) 2 Ves. Jr. *357; Morgan *v.* Gronow (1873) L. R. 16 Eq. 1; Lawrence's Estate (1890) 136 Pa. 354, 20 Atl. 521. The statement frequently found that to test the validity of such appointments, one must treat them as if inserted in the instrument creating the power, is inaccurate and confusing. It led to an erroneous result in Smith's Appeal (1879) 88 Pa. 492, which was remedied, however, by the decision in Lawrence's Estate, *supra.*

[3] Routledge *v.* Dorril, *supra,* footnote 2; Morgan *v.* Gronow, *supra,* footnote 2; In re Hallinan's Trusts [1904] 1 Ir. Rep. 452; Thompson *v.* Thompson [1906] 2 Ch. 199; Wollaston *v.* King (1868) L. R. 8 Eq. 165.

[4] 1 Tiffany, Real Property § 277.

[5] Sugden, Powers (8th ed.) 394 *et seq.* According to this definition it seems that a power to appoint by will only, even though that appointment may be of any estate, and to any person, is a special power, for one under it cannot make a present appointment to himself. See Lawrence's Estate, *supra,* footnote 2; *contra,* Johnson *v.* Cushing (1844) 15 N. H. 298.

[6] Bray *v.* Bree (1834) 2 Cl. & F. 453; Mifflin's Appeal (1888) 121 Pa. 205, 15 Atl. 525.

Whether a general power of appointment by will only comes within the rule or the exception has been the subject of dispute among writers[7] and conflict in the decisions.[8] The point arose recently in the case of *Minot* v. *Paine* (1918) 230 Mass. 514, 120 N. E. 167, wherein it was held that the *terminus a quo* for the application of the Rule against Perpetuities to a general testamentary power was the time at which the instrument creating the power took effect; not from the time of the exercise of the power. Were there no exception to the general rule, this conclusion could not be attacked. The reason assigned for this exception is that one who has a life estate and a general power of appointment by deed or will has an interest so closely approximating absolute ownership[9] that for purposes of applying the Rule against Perpetuities he may well be considered the beneficial owner. Whatever an absolute owner in fee can do, he can do; and when he exercises his power of appointment, he is in effect limiting his own property.[10] This is not the case where one has a life estate with power of appointment

[7]Mr. Gray in his work on Perpetuities, *op. cit.*, § 526 *et seq.*, advances a strong argument in favor of the rule exemplified by the decision in the principal case, and it is probable that this has played no little part in influencing the American courts to adopt this as their general rule. His argument is substantially that adopted by the court in the principal case. Mr. Gray, however, has given only the mathematical solution of the problem. His argument is ably attacked by Mr. Kales in "General Powers and the Rule against Perpetuities", 26 Harvard Law Rev. 64, and again by Mr. Thorndike in "General Powers and Perpetuities", 27 Harvard Law Rev. 705.

[8]The great weight of authority in the United States and Canada holds, in accordance with the principal case, that the *terminus a quo* in case of a power to appoint by will only is to be placed at that point of time when the instrument creating the power becomes effective. Boyd's Estate (1901) 199 Pa. 487, 49 Atl. 297; Reed *v.* McIlvain (1910) 113 Md. 140, 77 Atl. 329; Gambrill *v.* Gambrill (1914) 122 Md. 563, 89 Atl. 1094; *Re* Phillips (1914) 28 Ont. L. R. 94. In England the law seems settled the other way. Rous *v.* Jackson (1885) L. R. 29 Ch. Div. 521; *In re* Flower (1885) 55 L. J. Ch. (N. S.) 200; Stuart *v.* Babbington (1891) L. R. 27 Ir. Rep. 551, although the earlier case of *In re* Powell's Trusts (1869) 39 L. J. Ch. (N. S.) 188, which must now be deemed overruled, accords with the American view. Much confusion has been occasioned by the failure to discriminate between cases where the power itself cannot be exercised within lives in being plus twenty-one years, and cases where the estate created by virtue of the exercise of the power cannot vest within that period. Examples of the former class are Morgan *v.* Gronow, *supra,* footnote 2; Wollaston *v.* King, *supra,* footnote 3; Tredennick *v.* Tredennick [1900] 1 Ir. Rep. 354. It is apparent that in such case the present problem could not arise, for no one would argue that a life estate coupled with a void power of appointment is equivalent to absolute ownership. In New York the case is regulated by statute in accordance with the trend of American decisions. Consol. Laws c. 50, § 178; Genet *v.* Hunt (1889) 113 N. Y. 158, 21 N. E. 91.

[9]See Mifflin's Appeal, *supra,* footnote 6; Tredennick *v.* Tredennick, *supra,* footnote 8; Gray, *op. cit.* § 526b.

[10]See Lawrence's Estate, *supra,* footnote 2; *Re* Phillips, *supra,* footnote 8; Sugden, *op. cit.,* 394. The writer intimates that where one can at any time make any limitation of the estate, the rule does not apply because there is no tendency to a perpetuity. This can no longer be supported, based as it is upon the now-exploded notion that the Rule against Perpetuities is directed against inalienability. The case of *In re* Hargreaves (1890) 43 Ch. Div. 401, clearly settles the English law to the effect that the Rule is directed against remoteness in vesting. See Gray, *op. cit,* § 277.

by will only.[11] By no device can the life tenant make himself the absolute owner in fee. "So long as he is alive, the condition necessary for the exercise of the power is not fulfilled, and after he is dead, he cannot be an appointee."[12] But on the other hand it has been argued that while this distinction undoubtedly exists in fact, the courts have made little of it; and that the time when we should seek whether a man has absolute ownership is at the time of the exercise of the power. Consequently, since a life tenant with power to appoint by will is at his death practically owner, the same rule should be applied in each case.[13]

The pertinent question to be considered, however, is not whether the tenant for life with power of appointment by will only is the absolute owner of the fee, but whether his interest sufficiently approximates absolute ownership so as to enable the courts to apply the same rules in regard to it that they apply to the interest of a life tenant with general power of appointment by deed or will. It seems that the rule which considers the latter as the equivalent of absolute ownership is itself founded more on policy and good sense than on strict logical analysis. However closely this interest approximates absolute ownership, it is not, nor have the courts invariably so treated it. For instance, although creditors are usually able to reach the property appointed under a power of this sort ahead of appointees,[14] they are powerless where the power has not been exercised.[15] Again, a wife may not claim dower rights in such an interest.[16] Both of these conclusions are inconsistent with the idea of absolute ownership being in the life

[11]See Lawrence's Estate, *supra,* footnote 2; Tredennick *v.* Tredennick, *supra,* foonote 8; *Re* Phillips, *supra,* footnote 8; Sugden, *op. cit.,* 396; but see Johnson *v.* Cushing, *supra,* footnote 5. In New York, under the Revised Statutes (Consol. Laws c. 50, § 152), "where a general and beneficial power to devise the inheritance is granted to a tenant for life, he is deemed to possess an absolute power of disposition". Nevertheless, upon execution of the power, the period during which the absolute power of alienation may be suspended is computed, not from the date of the instrument exercising the power, but from the date of the creation of the power. *Supra,* footnote 9.

[12]Gray, *op. cit.,* § 952.

[13]Mr. Kales in "General Powers and the Rule against Perpetuities", *supra,* footnote 7; see footnotes 7 and 8.

[14]*Infra,* footnote 15.

[15]The precise nature of the interest of one having a life estate plus a general power of appointment is brought out more clearly here than in perhaps any other place. It is generally held in such cases that the creditors of the donee may in equity reach the property subject to the power of appointment. See Brandies *v.* Cochrane (1884) 112 U. S. 344, 5 Sup. Ct. 194; *cf.* Manson *v.* Duncanson (1896) 166 U. S. 533, 17 Sup. Ct. 647; see O'Grady *v.* Wilmot [1916] 2 A. C. 231. Nevertheless, the creditors' rights attach only after the exercise of the power, Holmes *v.* Coghill (1802) 7 Ves. Jr. *499; see Johnson *v.* Cushing, *supra,* footnote 5; Patterson & Co. *v.* Lawrence (1883) 83 Ga. 703, 10 S. E. 355, and the other assets of the decedent must first be exhausted. Patterson *v.* Lawrence, *supra,* footnote 15. The courts have not hesitated to criticize the doctrine, see O'Grady *v.* Wilmot, *supra,* footnote 15, and it is obvious that any argument from the general rule that a life tenant with general power of appointment is therefore absolute owner is not well founded.

[16]Ray *v.* Pung (1822) 5 B. & Ald. 561; Sugden, *op. cit.* 144, note.

tenant with general power of appointment by deed or will. And on the other hand, we find instances where the courts have not hesitated to treat the conjunction of a term for life with power to appoint by will only in exactly the same manner as they do a life tenancy with general power of appointment by deed or will, where policy dictates. For instance, it is held that the appointed property may be reached by creditors of the donee in equity in either case after appointment;[17] and that the appointed property is in either case subject to inheritance taxation as descending from the donee,[18] conclusions directly opposed to the notion that the appointee takes from the one creating the power. Consequently, there seems to be no insurmountable objection to treating the two as the same in respect to the application of the Rule against Perpetuities,[19] and therefore the conclusion reached in any given case depends upon whether in the opinion of that court a sound public policy requires a rigid adherence to the letter of the Rule. In the typical case where property is limited to A for life with power in him to appoint the remainder by will, and he appoints to B for life, and on B's death to his issue, B not having been born in the lifetime of the donor, under the letter of the Rule, the limitation to the issue would fail for remoteness. The only result of holding this limitation good, however, would be, not to break down the Rule against Perpetuities, but merely to advance the *terminus a quo,* for the estates appointed under the instrument exercising the power must still vest within twenty-one years after lives in being.[20] It is needless to point out at this time that the courts are loath to depart from the Rule against Perpetuities.[21] Nevertheless, since the estates created by virtue of the exercise of a power of appointment by will only will vest at no more remote period than those created under a power to appoint by deed or will and since the purpose to be accomplished is probably the same in both cases, it is submitted that the exception engrafted upon the Rule in one case may with equal justification be extended to the other.

[17]That creditors of the donee may reach property subject to a general power of appointment by deed or will is well settled. *Supra,* footnote 15. The same rule has been applied in cases where the power of appointment was by will only. Johnson *v.* Cushing, *supra,* footnote 5; Clapp *v.* Ingraham (1879) 126 Mass. 200; see *In re* Davies' Trusts (1871) L. R. 13 Eq. 163; *contra,* Balls *v.* Dampman (1888) 69 Md. 390, 16 Atl. 16; Wales' Adm'r. *v.* Bowdish's Ex'r. (1888) 61 Vt. 23, 17 Atl. 1000.

[18]By deed or will: see Minot *v.* Stevens (1911) 207 Mass. 588, 93 N. E. 973, but *cf.* O'Grady *v.* Wilmot, *supra,* footnote 15. By will only: Chanler *v.* Kelsey (1907) 205 U. S. 466, 27 Sup. Ct. 550; Matter of Dows (1901 167 N. Y. 227, 60 N. E. 439, *aff'd., sub. nom.* Orr *v.* Gilman (1901), 183 U. S. 278, 22 Sup. Ct. 213.

[19]Farwell, Powers (3rd ed.) 327, "And on principle it is submitted that for the purpose of the rule against perpetuities a general power to appoint by will, following a life estate in the donee of the power * * * is equivalent to absolute ownership."

[20]*Supra,* footnote 9.

[21]There have, of course, been some exceptions to the Rule against Perpetuities. Mr. Gray notes the following as among the real ones: covenants for renewal in a lease, (*op. cit.* § 230); rights of entry for condition broken, in the United States (*op. cit.* § 304); conditions in long term mortgages (*op. cit.* § 566); easements acquired by custom, in England (*op. cit.* § 572); a remote gift to a charity after a gift to another charity (*op. cit.* § 597).